Supreme Court of the United States

OCTOBER TERM, 1954

No. 69

JOE VALDEZ GONZALES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Petitioner

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MAY IT PLEASE THE COURT:

The points that petitioner deems it necessary to answer shall be considered in the order in which they occur in the brief of the respondent.

I.

The questions presented are unduly restricted by the respondent. (See page 2 of its brief.) The respondent fails to recognize that question III and point Two (pages 8, 22

and 41) of petitioner's brief are not a part of the basis-in-fact question. The question involves a violation of procedural due process regardless of whether the classification is held to be supported by basis in fact. There nevertheless remains the procedural due process problem presented by the illegal recommendation of the Department of Justice.

II.

Respondent (pages 4 and 5, footnote 4) attempts to color the facts to show inconsistency in statements. There is no disagreement between the statements by petitioner and the affidavit signed by twenty-two persons that he had been "performing other duties required of ministers of the Gospel" for over a year and a half before April 8, 1951. [R. 48] Petitioner states in his conscientious objector form that he "started out actively in the service of God" during December of 1949. [R. 44] He was here talking about his duties in the field ministry beginning in December, 1949. He was attending meetings and taking part in the ministry school of Jehovah's Witnesses, preparing for the field ministry, beginning in October, 1949. [R. 48] He was not ordained until February, 1950. Therefore, there is no inconsistency between the statements of petitioner and those of the twenty-two persons signing the affidavit. In any event, any ambiguity relates to the ministerial claim. It has no relevance to the conscientious objector status. It should be remembered that petitioner testified extensively before the local board and he offered additional evidence. The board told him they did not doubt what he said but accepted it as true since he made the statements under oath. [R. 59] In its recommendation the Department of Justice did not rely upon any unexplained difference in the time of beginning his ministerial duty. [R. 15, 67-68]

III.

Respondent mentions petitioner's performing 40 hours' secular work, thereby implying that he did not tell the truth when he said that this did not interfere with his full-time preaching activity (requiring a minimum of 100 hours per month). (See respondent's brief, page 6.) The local board recognized that petitioner was telling the truth on this point. He told the board that such secular work did not interfere with his ministry because he was working a shift beginning at midnight and that he performed his ministry during the daytime. [R. 56]

IV.

Respondent places emphasis (page 7, respondent's brief) on Gonzales' stating that his conscientious objection was "based entirely on his personal interpretation of the Bible." While he reached his conclusions by personal study and interpretation, he got his religious training and belief with Jehovah's Witnesses. This makes immaterial the point asserted here.—*United States* v. *Everngam,* D. W. Va., 1951, 102 F. Supp. 128.

V.

Respondent attempts to make inconsistencies out of Gonzales' statement that there were no publications by Jehovah's Witnesses relating directly to war. This has been answered on pages 36-37 of petitioner's main brief. Petitioner was here merely stating what the president of the legal governing body of Jehovah's Witnesses had stated. —See brief for the United States in *Sicurella* v. *United States,* No. 250, October Term, 1954, at page 22, footnote.

VI.

Respondent refers to the summary made by the local board (respondent's brief, pages 8-9). This summary should be read along with the stenographic report of the personal

appearance appearing in the record. [R. 52-60] It is to be observed in the memorandum that the local board failed to indicate that it disbelieved the petitioner. It is necessary for the local board to make a memorandum in the event it disbelieves the registrant. (*Williams* v. *United States*, 5th Cir., 1954, 216 F. 2d 350, 351; *Ashauer* v. *United States*, 9th Cir., No. 14,304, Dec. 21, 1954, — F. 2d —; *Pitts* v. *United States*, 9th Cir., No. 14,164, Dec. 7, 1954, — F. 2d —) The local board stated concerning the hearing that it did not doubt any of the testimony of petitioner given at the hearing. [R. 59]

VII.

Respondent gives only part of the testimony of the hearing officer, the Government's witness (page 12, respondent's brief). Other parts of the hearing officer's testimony show that he based the denial solely on Gonzales' being a recent convert to Jehovah's Witnesses, since Gonzales had previously been a Catholic. [R. 13, 15, 19-20] The use of the vague and indefinite testimony, full of opinion, is to be limited by the hearing officer's report. [R. 15]

VIII.

Respondent (page 16 of its brief) challenges the applicability of the doctrine of this Court in *Dickinson* v. *United States*, 346 U. S. 389 (1953), to conscientious objector cases. This is established by the decisions cited on pages 32-33 of the petitioner's main brief. To this list should be added *Ashauer* v. *United States*, 9th Cir., No. 14,304, Dec. 21, 1954, — F. 2d —; and *Pitts* v. *United States*, 9th Cir., No. 14,164, Dec. 7, 1954, — F. 2d —.

IX.

It is stated by respondent that the "objective tests for the ministerial exemption" cannot be applied to the conscientious objector status. (See page 16, respondent's brief.)

This is answered in the main brief for petitioner in *Simmons* v. *United States*, No. 251, October Term, 1954, at pages 34-35.

X.

Respondent argues (pp. 16-17) that there is a different court procedure to be followed in applying the basis-in-fact rule in conscientious objector cases from that in cases involving ministerial status. This is answered on page 32 of the brief for petitioner in *Simmons* v. *United States*, No. 251, October Term, 1954.

XI.

Respondent says that the statements appearing in Selective Service forms are self-serving and are not evidentiary, but need to be corroborated. (See respondent's brief, pages 17-18.) It should be remembered that the act and the regulations make statements appearing in forms, if false, subject to perjury prosecution. This establishes that they are evidentiary and not mere claims unsupported by proof. The Department of Justice relies upon the answers appearing in the conscientious objector forms as evidence for the denial of the status. If the forms can be used as evidence for denial of the status, they can be employed in support of the conscientious objector status.

XII.

It is stated that it is necessary for petitioner to provide corroboration of his sincerity (page 18). This is answered in the main brief for petitioner at the bottom of page 46.

XIII.

The respondent underscores (page 18 of its brief) that part of the statute referring to "character and good faith of the objections of the person concerned." What has been said on the use of the word "conscientiously" applies also

to the words "good faith."—See the main brief for petitioner in *Sicurella* v. *United States*, No. 250, October Term, 1954, pages 41-42.

XIV.

Because of "the discrepancy" in the claim of Gonzales respondent states that petitioner's behavior reflects his insincerity (pages 18-19). It is argued that petitioner became of draft age on July 22, 1949, and that he was raised a Catholic and remained a Catholic until he married. Then he became one of Jehovah's Witnesses and became active as a minister. (See respondent's brief at pages 13, 19-20.) The previous religion of a registrant is immaterial. Does respondent mean to say that every man of draft age who changes his religion and claims to be a conscientious objector is per se a liar, a crook and a draft evader? Apparently so from the argument respondent makes here. Certainly Congress had in mind that an honest person with the utmost of good faith could change his religion even while subject to the draft. Apparently respondent implies that every man who marries a woman that is of a conscientious objector faith and embraces her religion while of draft age is *ipso facto* a draft evader. Surely this court will keep in mind that petitioner became one of Jehovah's Witnesses while the draft law was in the "deep freeze." This expression was used by Judge McGranery in In re *Fabiani*, E. D. Pa., 1952, 105 F. Supp. 139. He found no evasion in enrollment in a medical school there. If the "deep freeze" protected a man enrolled in a medical school, then why should it not protect one of Jehovah's Witnesses? At the time Gonzales became one of Jehovah's Witnesses there was no imminence of military liability. He trained for the ministry beginning in October, 1949, became active in December, 1949, and was ordained in February, 1950. All of this took place before June 24, 1950, the date of the beginning of the Korean War. The draft law was still in the "deep freeze." Inductions resumed in August, 1950. So how

can the Government consistently argue *prima facie* evasion from such facts when there was no draft in process?

XV.

Respondent states (page 20 of its brief) that petitioner went to work for a steel company. This point was not relied upon by the Department of Justice in its recommendation. It was referred to by the trial court but was wholly irrelevant to the conscientious objector claim.—See the main brief for petitioner in *Witmer* v. *United States*, No. 164, October Term, 1954, pages 40-48. See also the explanation given by petitioner himself about this. [R. 56-58]

XVI.

The respondent argues extensively about the pioneer ministerial activity of the petitioner. (See pages 20-23 of its brief.) His appointment as such is criticized. The nature of the evidence supporting his ministerial status is condemned. Yet on this point his proof is as strong as—if not stronger than—that in *Dickinson* v. *United States*, 346 U. S. 389 (1953), except for the fact that Gonzales devoted 40 hours a week to secular work (performed at nighttime). This entire argument made by the Government against petitioner's ministerial status, however, is wholly irrelevant and immaterial. (*Pine* v. *United States*, 4th Cir., 1954, 212 F. 2d 93) The ministerial question is not at issue in this case. If it were in issue, then what is said about the motive of Gonzales in taking up the ministry is wholly irrelevant and immaterial, according to the opinion of this Court in *Dickinson* v. *United States*, 346 U. S. 389, 392-393 (footnote 5). If this argument is immaterial on the ministerial claim, then by force of the same argument all this entire argument concerning the evidence offered by petitioner to the board regarding his ministerial status is also immaterial in considering the conscientious objector claim.

It was unnecessary for Gonzales to be a minister in

order to claim conscientious objection. (*United States* v. *Dal Santo*, 7th Cir., 1953, 205 F. 2d 429; cert. denied 346 U. S. 858 (1953)) Judge Picard's reasoning in an oral opinion in *United States* v. *Kobil*, No. 32,390, Eastern District of Michigan, Southern Division, September 13, 1951, applies here:

> "Then his case came before a hearing officer, Mr. Caniff, and here is what he says—and to me this is significant. He concludes:
>
> " 'The fact that registrant originally based his claim of exemption on the ground that he was a minister of the gospel and afterwards changed his reasons for exemption maintaining he did not consider himself a minister as his faith was not strong enough clearly indicates his uncertainty and doubts about his religious beliefs.'
>
> "That isn't true at all. Because a man doesn't feel that he is a minister doesn't mean he doesn't believe in that faith. As I told counsel before you came in, I have known people who have entered the seminary to become a Catholic Priest, and after they have been there they say, 'Wait a minute; I don't belong here as a Catholic Priest,' and they have left the seminary and went out and they are good Catholics. I suppose you have found that out about young men you know, Presbyterians or Lutherans, everybody else. They might have at one time said, 'I am a minister,' or 'I want to be a minister,' and then changed their mind. That doesn't change a man's faith at all. Sometimes it shows an increased faith instead of a lack of faith.
>
> "This young man couldn't qualify as a minister under the regulations of Congress.
>
> "He could qualify as a minister in the Jehovah's Witnesses, but that isn't enough.

"I have searched this record. I have asked counsel to point out to me one thing that the board had before it besides its natural prejudices and its capricious manner—which I can understand, too, being of the type I am; it is very difficult for me to tell you what I think you ought to do and must do.

"But it was absolutely without any basis in fact and there was no right for this draft board to classify him as I-A. What they should have done, in my opinion, is to have made further inquiry that gave them that right. There is nothing I have here to show and nothing they have that shows it if they did.

"He is a conscientious objector. The worst he should have gotten from his angle was to have been classified for non-combatant service as a conscientious objector. If he was a conscientious objector, no matter what they found, they could have classified him as a conscientious objector and could have classified him for non-combatant service."

XVII.

Because of the extensive argument made about petitioner's ministerial status it is, nevertheless, necessary to answer some of the points made by the respondent in its brief because of inaccuracies appearing in such argument. It is stated that petitioner was not active in his religion until December, 1949. The affidavit of twenty-two persons showing active study before then appears in the record. [R. 48]

XVIII.

Respondent argues (footnote, page 22) that the Department of Justice found petitioner not to be sincere and in good faith. The Department of Justice failed to specify

that it disbelieved petitioner or expressly that he was not acting in good faith. In view of the finding by the hearing officer and the absence of anything explicit to the contrary it must be assumed that the Department of Justice did not challenge his sincerity. (*Williams* v. *United States*, 5th Cir., 1954, 216 F. 2d 350; *Ashauer* v. *United States*, 9th Cir., No. 14,304, Dec. 21, 1954, — F. 2d —; *Pitts* v. *United States*, 9th Cir., No. 14,164, Dec. 7, 1954, — F. 2d —) It should be remembered that the local board stated that it did not disbelieve Gonzales. "Since you made these statements under oath, we do not doubt it." [R. 59]

XIX.

The testimony of the hearing officer (relied upon in footnote 14, page 23, respondent's brief) is irrelevant and immaterial to the basis-in-fact question. The Court must determine the question from the draft board record and not from the testimony that the hearing officer gave in explanation of his recommendation.—*Pine* v. *United States*, 4th Cir., 1954, 212 F. 2d 93; *Cox* v. *United States*, 332 U. S. 442 (1947).

XX.

It is said that Gonzales changed his religion and that this is not to be considered as an "abstract proposition." With this petitioner agrees but, in order to spell bad faith there must be some other evidence of a true and positive nature to color the change of religion with bad faith. (*Schuman* v. *United States*, 9th Cir., 1953, 208 F. 2d 801) Although this decision was said to be dictum in *White* v. *United States*, 9th Cir., Sept. 14, 1954, 215 F. 2d 782 (pending on petition for certiorari, No. 390, October Term, 1954), the Court of Appeals for the Ninth Circuit later unanimously relied upon it to support a conclusion that the denial of the conscientious objector status was without basis in

fact.—*Ashauer* v. *United States*, No. 14,304, Dec. 21, 1954, — F. 2d —.

XXI.

Respondent states (page 24) that Gonzales exaggerated, stretched the point and misrepresented his ministry back to a time before he was assigned to a unit. This statement is itself a gross exaggeration. There were only two months difference from the time when Gonzales was attending the ministry school and preaching student sermons from the pulpit to the time when he became a regular, unordained minister. This attitude of the respondent is quibbling over the ministerial status of the petitioner, which has no relevance here. It should be remembered that neither the local board nor the Department of Justice challenged his sincerity or truthfulness. Indeed, his sincerity was admitted by the local board; yet the Government speculates for the first time against Gonzales. Since the local board and the Department of Justice did not rely upon this argument it comes at too late a time for respondent to rely upon it now.

XXII.

The old argument about Gonzales' working in a defense plant (which was not even relied upon by the Department of Justice before the appeal board) is made (pages 24-25, respondent's brief). For the answer to that specious and factitious argument of the Government (quoting from petitioner's testimony) the Court is referred to the main brief for petitioner in *Witmer* v. *United States*, No. 164, October Term, 1954, pages 40-48.

XXIII.

It is suggested (footnote 16, page 25) that because Gonzales was willing to assist a wounded person he was eligible for the I-A-O classification. He stated that he would not

assist people "injured in battle," which definitely shows that he was not willing to take on noncombatant military service.

XXIV.

It is said that petitioner was properly denied the conscientious objector status because the law did not cover his type of religious belief (footnote 17, page 25). This is fully answered in the reply brief for petitioner in *Sicurella* v. *United States,* No. 250, October Term, 1954, at pages 15-33.

XXV.

It is argued that it was necessary for Gonzales to have more corroboration. Respondent states that he had "no real corroborating evidence." (See respondent's brief, page 26.) Since neither the local board nor the Department of Justice nor the appeal board called for more corroborating evidence it is entirely out of place for the Government to argue this point at this late date as basis in fact.

XXVI.

An invalid argument is made. It is said (page 26) that the two affidavits tended only to support "his ministry claim and do not relate to his" conscientious objector claim. Local Board Memorandum No. 41, issued November 30, 1951 (quoted from at pages 29-30 of the petitioner's main brief in *Sicurella* v. *United States,* No. 250, October Term, 1954), shows that it is unnecessary to have all the proof in the conscientious objector claim. If the proof appears in statements establishing the ministerial claim then, according to local board practice, it was the responsibility of the local board to consider these statements insofar as they relate to the conscientious objector claim. What the respondent is attempting to do is to regard petitioner as though he were a litigant represented by counsel before the local board, contrary to *Berman* v. *Craig,* 3rd Cir., 1953, 207 F. 2d 888, 891.

XXVII.

In footnote 20 (page 27) it is stated that petitioner apparently is not cognizant of the change made in the regulations requiring that the hearing officer's report no longer be transmitted to the appeal board. The amended regulation (dated June 18, 1952, E. O. 10363, 17 F. R. 5456) was issued over two months after the draft board file of Gonzales was forwarded to the appeal board. [R. 40] It was also made twelve days after the appeal board referred the file to the Department of Justice for the appropriate investigation and inquiry. [R. 41, 64-66] The new regulation, therefore, was not in effect and did not control the procedure to be followed in this case. It was erroneous for the Department of Justice not to forward the hearing officer's report to the appeal board because the old regulation appearing on pages 6-7 of petitioner's main brief was in effect and controlled the procedure to be followed upon his appeal at the time the appeal was taken and the papers were received by the Department of Justice.

But if it be assumed that the new regulation was in effect and applies to the procedure to be followed in Gonzales' appeal, then the regulation is a nullity because it is contrary to the statute. There had been outstanding for over ten years the old regulation that had been approved by Congress in reenacting the 1948 Act and the 1951 Act, called the Universal Military Training and Service Act. What was said by the court in *Sterrett* v. *United States*, 9th Cir., 1954, 216 F. 2d 659, 664-665, applies here. In that case another part of this same Executive Order was declared invalid by the Ninth Circuit. It was, therefore, the responsibility of the Department of Justice to forward to the appeal board the report of the hearing officer of the Department of Justice, notwithstanding the new regulation.

XXVIII.

Respondent says that there is no statutory authority for the procedural step demanded by petitioner (that he be notified of the adverse recommendation of the Department of Justice and given an opportunity to answer it before the appeal board). (See respondent's brief, page 28.) The statutory authority for this procedural requirement is the "fair and just" provision of the act (50 U. S. C. App. § 451(c) page 2 of petitioner's main brief).

XXIX.

It is argued that *United States* v. *Nugent*, 346 U. S. 1 (1953), is applicable. That decision does not apply here. All that was held there was that the giving of a summary instead of showing the FBI report was sufficient to satisfy the requirements of procedural due process of law. That case did not deal with the subject of failing to give notice. The very minimum requirement of procedural due process of law is that a registrant be notified. The *Nugent* decision, *supra*, is authority for only the holding made. It did not touch upon the issue involved here.

Should the Court consider that *United States* v. *Nugent*, 346 U. S. 1 (1953), is applicable, then this Court is requested to reconsider and overrule *Nugent*, *supra*, because it is in conflict with *Estep* v. *United States*, 327 U. S. 114 (1946), which requires that the rule of law in deportation cases be applied. Respondent is arguing for a lower degree of due process than is applied in deportation cases. It is said that *Nugent*, *supra*, and the cases there cited support the respondent. If so, now is the time to reconsider and overrule *Nugent*, because it conflicts with all the cases cited on page 53 of petitioner's main brief.

XXX.

It should be remembered that the scope of review in Selective Service cases is restricted. This narrow review

makes imperative strict compliance with procedural due process of law. (See page 49 of petitioner's main brief.)

It has been held in many cases that the failure to give notice of any action taken affecting a registrant's rights is a violation of procedural due process of law. See what Judge Learned Hand said in *United States* v. *Balogh*, 2d Cir., 1946, 157 F. 2d 939, 943-944 (vacated 329 U. S. 692 (1947); affirmed 160 F. 2d 999), where the registrant was not given an opportunity to answer the recommendation of a theological panel. The holding of the court below is in direct conflict on this point with *Eagles* v. *Samuels*, 329 U. S. 304, 312-314 (1946); compare also *DeGraw* v. *Toon*, 2d Cir., 1945, 151 F. 2d 778; and *Brewer* v. *United States*, 4th Cir., 1954, 211 F. 2d 864.

The courts have held without any disagreement that failure to give notice to a registrant of the sending of his file to the appeal board that deprived him of the right to reply and argue against the classification of the local board was a denial of procedural due process of law.—*United States* v. *Fry*, 2d Cir., 1953, 203 F. 2d 638; *United States* v. *Stiles*, 3rd Cir., 1948, 169 F. 2d 455; compare *United States* v. *Vincelli*, 2d Cir., 1954, 215 F. 2d 210; *United States* v. *Graham*, N. D. N. Y., 1952, 108 F. Supp. 794; *United States* v. *Strebel*, D. Kans., 1952, 103 F. Supp. 628.

XXXI.

Respondent implies that what petitioner is seeking here is "a separate hearing" in the appeal board. What petitioner is after here is not a new hearing. What he desires is notice of the adverse recommendation so that he may write a letter to the appeal board and state his position before his case is finally determined. All that petitioner wants is notice and an opportunity to reply. The registrants in *United States* v. *Fry, supra; United States* v. *Stiles, supra; Eagles* v. *Samuels, supra;* and *Degraw* v. *Toon, supra,* were not seeking a new hearing. The courts held that they were entitled to notice. Since all that petitioner here is seeking is the

right to notice and an opportunity to reply, then he is seeking for no more than the registrants in the cases just referred to.

XXXII.

All the talk (pages 32-33, respondent's brief) about the Department of Justice procedure is wholly irrelevant and immaterial. While petitioner has the right to be heard in the Department of Justice, he never at any time has an opportunity to be heard on the so-called advice or recommendation to the appeal board. The action taken by the Assistant Attorney General is wholly without notice to the petitioner. It is stated that a more uniform type of procedure would be provided by overruling petitioner in this case. There would still be a uniform type of procedure even though this Court were to hold that due process of law is required. If the rights of petitioner have been violated by this action of the Department of Justice, then the rights of every other registrant denied the conscientious objector classification have been violated. What the Court should do is establish a uniform type of procedure that accords with due process of law, by declaring the present procedure to be invalid.

At the top of page 33 it is stated that what Congress intended for the Department of Justice to supply to the appeal boards was "an expert opinion." This is not true. What Congress wanted was stated by Senator Gurney. He said: "What we are after really are the facts and the Department of Justice has always shown itself perfectly capable of uncovering the facts."—94 Cong. Rec. 7305.

XXXIII.

Respondent implies (page 33 of the brief) that draft board proceedings are not quasi-judicial proceedings. The courts have held that draft board proceedings are quasi-judicial.—*Gibson* v. *Reynolds*, 8th Cir., 1949, 172 F. 2d 95

(cert. denied 337 U. S. 925 (1949)); *Dodez* v. *Weygandt*, 6th Cir., 1949, 173 F. 2d 965; *contra United States* v. *Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395.

Regardless of whether the proceedings are legislative or not, the fact of the matter is that the minimum of due process of law requires notice of the giving of the adverse recommendation in the same way that due process of law requires notice of the sending of the file to the appeal board in order to give the registrant an opportunity to contest the I-A classification given by the local board.

XXXIV.

It is said that petitioner "had ample notice that the Selective Service System intended to classify him I-A." (Respondent's brief, page 33) There was absolutely no notice at all that the appeal board was going to classify him I-A. He did not know the nature of the recommendation by the hearing officer. He had no knowledge of the recommendation by the Department of Justice. He could very well expect that the recommendation would be favorable when he had his appearance before the hearing officer, because the hearing officer did not tell him what his recommendation was going to be. The appeal board did not notify petitioner before it classified him I-A that he was to be thus classified. Then how can the respondent tell the Court that petitioner had "ample notice that the Selective Service System intended to classify him I-A"? (Respondent's brief, page 33) This is a groundless assertion that misleads.

XXXV.

It is stated (page 34) that petitioner could present facts at the hearing before the hearing officer. It is said that he could get a summary of the unfavorable information in the FBI file. It is said that he could freely express his views before the hearing officer and present all of his side of the case. But after all this is done the respondent still does not

show the Court why it is that petitioner should not be notified and given an opportunity to rebut the unfavorable recommendation. It would take no longer than the time required for the appeal board or the Department of Justice to write a letter and have the registrant answer it. There would certainly be no undue delay or hobbling of the Selective Service process. This very short delay is certainly not so great an injury to due process of law as is the damage done by permitting trials behind a person's back. The procedure in this case is similar to star-chamber proceedings. Such one-sided approaches to a tribunal have always been condemned. Secret conferences between the judge and one of the parties without an opportunity for the other side to be heard are reprehensible in any tribunal, judicial or administrative. That is exactly what was done in this case. There was no request for an "additional step" for petitioner that was not required by due process of law, which required the appeal board or the Department of Justice to take the first step by giving fairly the required notice of recommendation. There is every necessity under due process of law for notice. There must be an observance of rudimentary requirements of fair play. (*Chin Yow* v. *United States*, 208 U. S. 8 (1908); *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922)) A fraud order in the Post Office Department must be conducted with notice.—*Pike* v. *Walker*, App. D. C., 1941, 121 F. 2d 37; see also *Boeing Air Transportation, Inc.* v. *Farley*, App. D. C., 1935, 75 F. 2d 765.

XXXVI.

Respondent asserts (page 34) that because exemption is a special privilege granted as a matter of grace by Congress registrants can be denied due process of law that is required according to minimum standards of decency in administrative agencies. If this statement is correct, then the Court was wrong in deciding as it did in *Eagles* v. *Samuels*, 329 U. S. 304 (1946). To prejudice the Court against peti-

tioner respondent says that there have already been "fairly long delays in the classification of persons claiming conscientious objector status." (See page 34.) It is said that further delays are not to be encouraged. With this petitioner does not disagree, but the further delay here to satisfy the minimum requirements of due process would be only a matter of a few days. It would be up to the appeal board to determine and notify the registrant how many days he had to answer the recommendation of the Department of Justice. Surely this brief delay would not break down the wheels of the military machinery. The country would be better served by registrants' being accorded a fair trial and fair play in the Selective Service System than by the Selective Service System's begrudging and denying a few days in which registrants could reply to an adverse recommendation. It is better that all the conscientious objectors not feel that they are being tried behind their backs. The morale of all registrants would be subserved by a decision that would restore public confidence in the Selective Service System as being "fair and just" even though summary in operation. It is not true that the "standards of due process have thus been more than adequately met."

XXXVII.

Respondent relies upon *National Labor Relations Board* v. *Mackay Radio and Telegraph Company,* 304 U. S. 333, and *Local Government Board* v. *Arlidge,* [1915] A. C. 120, and other cases, on page 33 of its brief. These cases are shown clearly not to be applicable in the situation here, by Chief Justice Vanderbilt for the New Jersey Supreme Court in *Mazza* v. *Cavicchia,* 105 A. 2d 545, 556-561 (May 24, 1954). In the concluding part of that opinion he says for the court: "This, as we have seen from the cases in every court of last resort except the British House of Lords, has been held to preclude the submission by a hearer to the deciding authority of secret reports containing findings of

fact, conclusions of law and recommendations for the disposition of the case (105 A. 2d 25, page 561) The holding in the *Mazza* case, *supra,* is directly in point with this case and should be applied here.

CONCLUSION

WHEREFORE, for the reasons above stated and for those appearing in the main brief for petitioner, it is submitted that the judgment of the court below should be reversed.

Respectfully,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

January, 1955.